The Canadian Institute of Strategic Studies

de L'Institut Canadien D'Études Stratégiques

New Game, New Rules? The Applicability of the Geneva Conventions to New Wars

Stephanie Carvin
CISS Research Officer
Strategic Datalink #109
November 2002

On 5 November, 2002 the American CIA used an unmanned Predator aircraft destroy a car carrying a top al-Qaeda leader, Qaed Salim Sinan al-Harethi, and five other operatives. US officials suspected Harethi of involvement in the October 2000 al-Qaeda attack on the USS *Cole* off the coast of Yemen. The implications of this strike are not only significant for the 'war on terror', but also the laws of war. While the United States has used Predator drones to attack al-Qaeda and Taliban fighters in Afghanistan, this was the first time the tactic was used against an al-Qaeda target outside what was understood to be the area of hostilities

Almost immediately questions surrounding the attack emerged. Was this a justified action in an ongoing war on terror? Was it an assassination or 'extra-judicial killing'?[1] The answer may help shape the way wars are defined and fought in the years to come. As the nature of war is characterized less by 'classical' inter-state action and more by civil or intra-state conflict, the question of whether the old rules are applicable to 'new wars' is becoming central to those concerned with the mitigation and resolution of conflict. The so-called "war on terror" has added another level of complexity to this issue. Since non-state combatants such as al-Qaeda have no fixed address at which to strike, governments will be hard-pressed to continue "politics through other means".

This paper will examine whether the Geneva Conventions,[2] are still applicable to modern conflict. The first section will examine how the nature and conduct of war has changed over the past decade. The second part will examine the challenges these 'new wars' pose for international humanitarian law. The paper will argue that the principles enshrined in the Geneva Conventions are both relevant and applicable to the new strains of conflict which plague international society.

'New Wars'

According to Mary Kaldor of the London School of Economics, the wars of the post-Cold War world differ significantly from those which took place from 1945-1989. In her books, *New Wars* and *New and Old Wars: Organized Violence in a Global Era*, she distinguishes between these newer conflicts and the traditional 'Clausewitzean' wars which are fought between states for clearly defined political aims and where victory (or defeat) is absolute.[3] The first major difference relates to the lines on which the wars are fought. In contrast to the geopolitical or ideological goals of earlier wars[4] the notion of identity is central to the conflicts of today. Claims to power and legitimacy are increasingly based on appeals to a national, clan, religious, or linguistic in-group. Members of these groups adhere to an (overly) idealized representation of the past.[5] They may exploit past glories (including heroic defeats) in order to justify and build support for their present-day cause.

Kaldor's second point contends that the means by which 'new wars' are fought have changed.[6] She writes:

> The new warfare tends to avoid battle and to control territory through political control of the populations, but whereas guerrilla warfare, at least in theory... aimed to capture 'hearts and minds', the new warfare borrows from counter-insurgency techniques of destabilization aimed at sowing 'fear and hatred'.[7]

Kaldor also points out that 'new wars' are no longer fought solely by well-trained, disciplined, hierarchical armies, but by paramilitary units, local warlords, criminal gangs, police forces, mercenary groups and breakaway units of regular armed forces.[8] These groups are highly decentralized and operate through a mixture of confrontation and co-operation.[9] While paramilitary groups may be competing for the same territory, they may also trade with one another for arms, drugs and other spoils of war.

Kaldor also argues that 'new wars' create and sustain an alternative economy. As the war rages the formal economy is largely destroyed. States fail through

the loss of markets, loss of import protection, embargoes, non-existent infrastructure - particularly communications, energy and transport - or loss of specialists. Says Kaldor: "In many cases, joining a paramilitary group or becoming a criminal are the only ways of gaining work or income."[10] In these conditions, black markets thrive, money-laundering is rampant, and the trade in weapons, drugs and even humans flourishes. The factions and criminal elements who benefit are eager to perpetuate the conditions from which they make their profits.

But even though 'new wars' are frequently intra-state, they exhibit some of the characteristics of the inter-state wars of the past. Identity politics, black markets and fundamentalist ideologies do not respect borders and weakened states are powerless or unwilling to control the trans-national movement of partisans, ideas, weapons, and money. Some of the most prominent examples of this are the wars in the Balkans and in Africa where ethnic identity and clan membership transcend political boundaries.

Yet the newest iteration of war - the so-called "war on terror" - not only crosses political borders, but is being fought on a global battlefield and in many ways is revolutionizing the conduct of war. There are some similarities to the ways other 'new wars' listed above. Like the criminal-militants of civil and ethnic wars, the sub-national groups and super-terrorists may obtain their funding through drug-trafficking, weapons sales and illegitimate businesses, as well as through seemingly legitimate charities. However, it is also clear that the "war on terror" is unprecedented in many ways. The use of information technology networks (ie. the internet and 24-hour news networks) to rally support or spread propaganda globalizes what might otherwise be purely regional concerns. Another unique feature are the weapons involved. The hijacked planes that crashed into the World Trade Centre to the unmanned aircraft seeking out members of al-Qaeda expand the boundaries of unconventional warfare.

In essence, 'new wars' can be regarded as a mixture of war, crime and technology. Whereas 'old wars' were fought between professional armies accountable to a hierarchical chain of command, contemporary new coverage is heavily laden with images of child soldiers, high on drugs, on killing sprees with Kalashnikovs. The 'taxation' of humanitarian organizations at gunpoint by roving paramilitaries is also well-documented. Most importantly for the argument being made here is that there seems to be little, if any, protection for prisoners of war (POWs).

'New Wars' and the Geneva Convention

How can the Geneva Conventions, which requires the presence of armies sufficiently disciplined to observe the distinction between combatant and civilian, and between military and non-military objectives, be expected to work under the conditions of 'new wars'? As Michael Ignatieff of Harvard University observes, "Child soldiers know nothing of [Henri] Dunant's codes of honor."[11] It is unlikely that factory workers and farmers who have become paramilitary fighters do either. Worse, even when the laws and codes of humanitarian warfare are known, they are ignored. Says Kaldor, "These wars are rational in the sense they apply rational thinking to the aims of war and reject normative constraints."[12] This was the case in Bosnia where factional leaders promised to abide by the Geneva Conventions, and those who had served in the Yugoslav Army were trained in the European laws of war. But within two years of the outbreak of that war, the fighting became the preserve of semi-trained militias. Fledgling states ignored their responsibilities under the Conventions and their soldiers did not hesitate to violate its principles.[13]

There are other challenges facing the Geneva Conventions. Often the International Committee of the Red Cross (ICRC) is not allowed to monitor conflict zones, as was often the case in Bosnia and the civil wars in central Africa during the 1990s. Even when the ICRC is allowed access to these zones, its representatives are often attacked. When the opportunity to monitor the protection of POWs does arise, the ICRC frequently cannot find anyone who has the authority to ensure the safe-keeping of prisoners in line with the Conventions.[14] Finally, where intra-state conflicts are concerned the Geneva Conventions are on controversial legal grounds. Only states may be party to the Conventions. However, 'new wars' are increasingly fought by non-state actors who pay scant attention to the norms of international society. While al-Qaeda, without political leaders or territory, is fighting relentlessly to spill as much blood as it can in its war against the West, the powerful guerrillas, wealthy drug lords, and influential paramilitary groups continue to make Columbia a sanctuary for home-grown terrorist groups that use bombings, extortion, kidnapping, and assassination to achieve their ends.

With no means of enforcement through accountability to superior officers, political authorities, or a constitution, and little intention to keep the principles of humanitarian law even where there is some knowledge of them, it would appear that the Geneva Conventions are poorly equipped to deal with 'new wars'. Where merely living as a member of a rival clan is considered to be a crime, it would seem that there is very little possibility of guaranteeing the safety of POWs. Even law-based states such as the US may feel it necessary to suspend the rights of prisoners for what is sees as pragmatic reasons. For example, while the Geneva Conventions stipulate that all prisoners must be freed after hostilities have ceased, it is difficult, if not impossible, to know when a war against a shadowy terrorist organization has ended.

Ignatieff has argued: "Throughout the twentieth century, humanitarian law has been running an uneven race with the demonic inventiveness of military technology and the protean and ever-changing face of modern war."[15] True, although this does not necessarily dilute the relevance of the Conventions to these conflicts. Article 3, which is common to the four Conventions, states that the latter remain applicable in situations of armed conflict which are not of an international character. The Second Protocol says much the same.[16]

It seems almost absurd to argue about rules and laws in conflict where anar-

103-01676/

chy reins so freely. However, in virtually every armed conflict, the ICRC has insisted that the rules of war do apply. Where no state takes the responsibility to disseminate the terms of the Convention, or there is no national army to enforce the rules within its ranks, the ICRC takes steps to ensure that the laws of war are made known. This includes the use of radio dramas, television commercials, comics and basic symbols to ensure that the rules laid out in the Convention are understood by illiterate or uneducated combatants.

The proponents of the Conventions - especially the ICRC - insist that although the task of getting the participants of 'new wars' to adhere to a basic code of conduct is daunting, it is necessary and possible. As one ICRC official claims:

> All our endeavour is based on the belief that, even in the middle of the worst depravities of war, man retains a fundamental minimum of humanity... [W]ithout [this belief] we would have to admit that nothing distinguishes man from beast, *and that we will not admit*."[17]

Underlying these convictions lies a belief in the existence of an 'international society' in which all players - states and non-state actors — are accountable to higher principles embodied in international law rather than to what is expedient. Central to this school of thought is the notion that the Geneva Conventions are a reflection of natural law which cannot be violated without compromising humanity. To this end, the ICRC has endeavoured to demonstrate this to the combatants fighting these 'new wars'. In arguing that the principles in the Conventions are universal rather than Western, the ICRC has pointed out that they may be found in almost all cultures and civilizations. For example, to promote the protection of prisoners of war in Arab countries, ICRC delegates tell the story of the Arab warrior Saladin and his noble treatment of his prisoner Richard the Lionheart, the Crusader King. This is to make the point that the humanitarian element of Islamic law preceded contemporary international law by more than a thousand years.[18] Additionally, the ICRC has printed an illustrated paperback entitled *Chronicles of Islamic-Arab History*, with key provisions of the Geneva Conventions matched with bits of traditional Arab and Islamic wisdom.[19]

Michael Igantieff has noted that the ICRC's efforts reflect a sense of pragmatism regarding the human condition. They acknowledge the inevitability of war in the international system, but also that there are rules to which the parties in a conflict are bound. He goes on to suggest that adherence to the Conventions may be promoted by appealing to "the warrior's honor" – or to the principles and codes applicable in battle which vary from culture to culture, but seem to exist in all. Their common features are among the oldest artefacts of human morality.[20] Ignatieff writes:

> Warrior's honor was both a code of belonging and an ethic of responsibility. Wherever the art of war was practised, warriors distinguished between combatants and non-combatants, legitimate and illegitimate targets...civilized and barbarous usage in the treatment of prisoners and of the wounded. Such codes may have been honored as often in the breach as in the observance, but without then war is not war – it is no more than slaughter.[21]

He continues: "The Red Cross acknowledges that a warrior's honor is a slender hope, but it may be all there is to separate war from savagery. And a corollary hope is that men can be trained to fight with honor."[22]

The problem, Ignatieff concedes, is that more and more warriors no longer play by the rules – whether they be set by Geneva or ancient tribal codes. It is hard to see any form of honourable warrior tradition in African child soldiers, the farmer turned paramilitary in the Balkans, the September 11th hijacker or in the al-Qaeda gunman. Ignatieff attributes this to the fact that modern technology has increased the distance, both moral and geographic, between the warrior and his adversary.[23] Consider how the Afghan tradition of fighting has been altered by the Cold War. Originally, the Afghan tradition was based on small, mobile units that avoided direct confrontation with superior forces in favour of using the mountain passes to surround and/or ambush the enemy. It was a tradition that took account of the capabilities of a poor society and the climate of mountainous terrain. War was endemic, but it was self-limiting. However, the introduction of modern weapons from the Soviet Union and the United States altered this tradition. They have, according to Ignatieff, "overwhelmed the self-limiting ecology of warrior traditions. Afghan warriors of the past did not target mosques and minarets, hospitals and schools. Kabul is the graveyard of the warrior's honor."[24]

Yet it would be premature to completely reject the importance of codes of martial conduct in limiting the effects of war. Indeed, there is some evidence that appealing to "the warrior's honor" may not be an exercise in misplaced idealism.

The Case for "Warrior's Honour" as a Means to Enforce the Geneva Conventions

After his capture by a Somali militia during the disastrous raid on Mogadishu, on 3 October, 1993, American helicopter pilot Michael Durant received treatment very much along the lines of the Geneva Conventions. His captors protected him from hostile Somali crowds, provided a radio, permitted visits from members of the ICRC and the media, as well as decent food and shelter. Why were these Somali clan leaders so willing to provide these services for someone who was perceived to be a deadly enemy? According to the account Durant gave to Mark Bowden in his book, *Black Hawk Down*, they considered Durant a prisoner of war. "[They] believed that by treating the pilot humanely, he would improve the image of Somalis in America upon his release."[25] The Somalis had similar hopes for the release of Durant. Said Bowden:

> It was hoped that this gesture would undo at a stroke the awful images of the mob mutilating dead American soldiers, a scene that had embarrassed [the captors] and educated men of his clan. He repeatedly urged Durant to reassure him that he would tell the world how

well he had been treated in captivity.[26]

We can draw some important points from the treatment of Durant. First, that the captors were willing to act in accordance with the Conventions because they saw it as honourable and a chance to prove to the world that they were not the barbarous killers that they had been portrayed to be. Second, while the captors were acting along the lines of the Conventions, they were also acting in a manner consistent ancient codes from their society - in this case, Islam. One of Durant's captors believed he was bound to release Durant if he converted to Islam.[27] This is a Koranic principle long established when Muslims began fighting non-Muslim peoples. Finally, in adhering to international humanitarian law, it may be argued that the Somalis believed that they were accountable to the higher principles of natural law. Thus the Geneva Conventions and the idea of the warrior's honour can be seen to be complementary towards one another in achieving a positive end.

It is true that this is but one example of civility and humanity amidst a litany of bloody violations and brutality - especially when it comes to the treatment of prisoners of war. Yet it gives one hope that limits may be placed on the conduct of war even where the law holds little sway over hearts and minds. Even the Greek dramatist Euripides seems to partially subscribe to this idea with a line from his classical play *Trojan Women*: "What law permits, this sense of shame forbids to do."[28]

Conclusion

Although the nature of warfare has changed from that originally envisioned in the Geneva Conventions, the latter are still largely applicable to modern conflict. Even where one cannot appeal to what a state has agreed to internationally, or where it seems futile to point to the salience of law in restraining the beast lurking in the human heart, it is still possible to convince some combatants that they are bound by principles other than pure expediency. Clearly, a pragmatic approach must be taken. Those with extremist tendencies and maximalist objectives – such as al-Qaeda and its single-minded commitment to wanton destruction without hope of negotiated settlement – may be beyond the pale. However, other combatants in other wars may be restrained. This can be done by appealing to the "warrior's honour" and the traditions from which societies have grown – despite how decrepit they may have become.

Endnotes

[1]"A Strike in Yemen" *Washington Post* November 6, 2002. A20.

[2]Unless otherwise specified, the term 'Geneva Conventions' refer to the four Conventions of 1949 and the Additional Protocols of 1977 in this paper.

[3]Mary Kaldor "Introduction", *Restructuring the Global Military Sector Volume I: New Wars* (London: Pinter, 1997), 3.

[4]Mary Kaldor, *New and Old Wars: Organized Violence in a Globalized Era* (Cambridge: Polity Press, 1999), 6.

[5]Ibid., 7.

[6]Ibid.

[7]Ibid., 7-8.

[8]Ibid., 8.

[9]Ibid.

[10]Kaldor, *New Wars*, 17-18.

[11]Michael Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (London: Random House, 1998), 126. Henri Dunant is considered by many to be the inspiration behind the Geneva Convention.

[12]Kaldor, *New Wars*, 16.

[13]Ignatieff, *Warrior's Honor*, 133.

[14]Ibid., 128.

[15]Ibid.

[16] Text of the Geneva Conventions can be found at the ICRC website: http://www.icrc.org

[17]Ibid., 163. Italics from the text.

[18]Ibid., 150.

[19]Ibid.

[20]Ibid., 116.

[21]Ibid., 117.

[22]Ibid., 157.

[23]Ibid., 144.

[24]Ibid.

[25]Mark Bowden, *Black Hawk Down: A Story of Modern War* (London: Transworld Publishers Ltd., 1999), 320.

[26]Ibid., 328.

[27]Ibid., 326.

[28]Text found in Kingsbury, "Introduction" in Hedley Bull, Benedict Kingsbury and Adam Roberts, ed. *Hugo Grotius and International Relations,* (Oxford: Oxford University Press, 1990), 24, note 75.

The views expressed are those of the author and do not necessarily represent those of the CISS or its members.

Copyright 2002.

About the CISS

The Canadian Institute of Strategic Studies meets a need for a body of information on Canadian security issues and promotes public awareness of the significance of national and international developments. The CISS provides a forum for discussion of strategic matters, and through its educational and informational activities seeks to improve the basis for informed choice by the public of Canada and its leaders.